U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND J. SAY and U.S. POSTAL SERVICE,
POST OFFICE, Simi Valley, CA

Docket No. 00-1284; Submitted on the Record;
Issued October 10, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective May 1, 1998, on the grounds that he refused an offer of suitable work.

On July 31, 1996 appellant, then a 42-year-old clerk, filed an occupational disease claim alleging that on July 15, 1996 he first realized his lower back pain was due to his federal employment.[1] The Office accepted the claim for lumbar strain and, subsequently, a herniated disc at L4-5.

On August 1, 1997 the Office referred appellant to Dr. Gerald I. Fein, a Board-certified orthopedic surgeon, for an impartial examination to resolve the conflict in the medical evidence between Dr. Ibrahim M.H. Yashruti, a second opinion Board-certified orthopedic surgeon and Dr. Robert N. Brown regarding the issue of appellant's work capability and whether he continued to suffer any residual disability from his accepted employment injury.

In a report dated August 21, 1997, Dr. Fein diagnosed a five millimeter (mm) extruded disc at L4-5 and degenerative facet disease at L5-S1 and L4-5. He opined that appellant continued to have residual disability due to his accepted employment injury, which include numbness and weakness in the leg and the objective evidence. Lastly, Dr. Fein opined that appellant "must be rehabilitated to work at light-duty work where he is not asked to do any bending, stooping [and] lifting type activities. With light-duty work I do believe he could work eight hours per day."

On December 2, 1997 the employing establishment offered appellant the position of modified distribution part-time flexible (PTF) clerk, which he accepted on December 9, 1997.

[1] The Office assigned claim number 13-1111230 to this claim. The Board notes that the record contains evidence of a previous claim for an injury sustained on August 25, 1994, which the Office assigned claim number 13-1056839.

The work hours were listed as 12:00 to 6:00 p.m. and physical restrictions of no kneeling, bending, twisting or lifting over 15 pounds once an hour and he may work 8 hours. Appellant returned to work on December 11, 1997 working six hours per day and on January 15, 1998 reduced his hours to four per day per his physician's instructions.

On December 4, 1997 Dr. Fein reviewed the proposed job, which indicated appellant's work hours as 12:00 to 6:00 p.m. and physical restrictions of no kneeling, bending, twisting or lifting over 15 pounds once an hour and he may work 8 hours.

In a report dated January 30, 1998, Dr. Brown, appellant's attending Board-certified orthopedic surgeon, recommended appellant work four hours per day instead of eight due to his five mm bulging disc at L4-5 and standing or moving about has worsened the radiation to his leg.

In a letter dated February 9, 1998, the employing establishment offered appellant the position of PTF clerk with hours listed as 12:00 to 6:00 p.m. Monday, Wednesday, Friday and Saturday and 9:30 a.m. to 6:00 p.m. on Tuesday and Thursday. The employing establishment noted that the position was available for eight hours and that appellant's current restriction was for four hours. The physical restrictions of the position included no kneeling, prolonged standing and no lifting over 15 pounds once an hour.

On February 26, 1998 appellant accepted the job offer noting that he could only work four hours per day and there were additional restrictions on his filing duties.

On March 25, 1998 the employing establishment advised appellant that the offered position was available for six to eight hours per day.

In a letter dated April 1, 1998, the Office advised appellant that offered job was suitable based upon the opinion of Dr. Fein, the impartial medical examiner and advised appellant of the penalty provision under 5 U.S.C. § 8106(c)(2) for refusing a position found suitable.

In a decision dated May 1, 1998, the Office found that appellant had refused a suitable job offer and terminated monetary compensation under 5 U.S.C. § 8106(c).

In a letter dated April 7, 1998, appellant requested an oral hearing, which was held on November 17, 1998.

By decision dated January 19, 1999 and finalized on January 21, 1999, the hearing representative affirmed the May 1, 1998 decision terminating benefits for failure to accept a suitable position.

In a undated letter faxed on November 18, 1999, appellant requested reconsideration and submitted a November 14, 1999 report by Dr. Michael S. Sinel, an attending Board-certified physiatrist, in support of his request. In his report, Dr. Sinel concurred with the opinions of Drs. Brown and Fein that the objective evidence supported appellant's subjective complaints. Regarding the suitability of the offered position, he concluded that it was not suitable as appellant was incapable of performing a job requiring repetitive stooping, bending, pulling, kneeling, pushing, overhead reaching or prolonged standing or sitting. Dr. Sinel indicated that he concurred with Dr. Brown that appellant could only work four hours per day for five or six

days per week based upon appellant's "complaints prior to January 1998, the increased workload during December 1997 and evaluating his job description."

By decision dated November 19, 1999, the Office found that, based on Dr. Fein's referee opinion which represented the weight of the medical evidence, that appellant was capable of performing the position of PTF clerk offered by the employing establishment. The Office also found the report of Dr. Sinel was insufficient to cause a conflict with Dr. Fein's report. The Office, therefore, denied appellant's request for reconsideration and affirmed the January 19, 1999 hearing representative's decision.

The Board finds that the Office properly terminated appellant's compensation benefits effective April 28, 1996 on the grounds that he refused an offer of suitable work.

Under section 8106(c)(2) of the Federal Employees' Compensation Act,[2] the Office may terminate the compensation of an employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for the employee.[3] Section 10.124(c) of the Office's regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured has the burden of showing that such refusal or failure to work was reasonable or justified,[4] and shall be provided with the opportunity to make such a showing before a determination is made with respect to termination of entitlement to compensation.[5] To justify termination, the Office must show that the work offered was suitable and must inform appellant of the consequences of refusal to accept such employment.[6]

The initial question in this case is whether the Office properly determined that the position was suitable. The Board finds that the weight of the medical evidence establishes that the position was within appellant's physical limitations. Dr. Fein, an orthopedic surgeon and the referee medical examiner found that appellant could work a normal 8-hour day at his previous employment so long as his job duties were adjusted, consistent with his physical restrictions; *e.g.,* intermittent bending, twisting and standing for short periods of time and occasional lifting of up to 20 pounds. The Office properly found that the limited-duty position of PTF clerk offered by the employing establishment was within these restrictions. The offered position, therefore, appears to be consistent with these restrictions.

A review of the above evidence indicates that there is substantial medical evidence to support a finding that the offered position was within appellant's physical limitations. The weight of the medical evidence, as represented by Dr. Fein's referee medical opinion, establishes that the position offered was within appellant's physical limitations.

[2] 5 U.S.C. § 8123(a).

[3] 5 U.S.C. §§ 8101-8193.

[4] *Patrick A. Santucci*, 40 ECAB 151 (1988); *Donald M. Parker*, 39 ECAB 289 (1987).

[5] 20 C.F.R. § 10.124(c); *see also Catherine G. Hammond*, 41 ECAB 375 (1990).

[6] *See John E. Lemker*, 45 ECAB 258 (1993).

The Board has held that when there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist to resolve the conflict of medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper medical background must be given special weight.[7]

The determination of whether an employee is physically capable of performing the job is a medical question that must be resolved by medical evidence.[8] The weight of the medical evidence in this case establishes that appellant was capable of performing the position of mail processor. The Board finds that the Office properly found that Dr. Fein's referee opinion was sufficiently probative, rationalized and based upon a proper factual background and that it, therefore, constituted sufficient medical rationale to support the Office's April 1, 1998 decision, terminating appellant's compensation.

Although appellant contends that he was medically unable to perform the offered job based on the opinions of Drs. Brown and Sinel, the weight of the medical evidence, as represented by Dr. Fein's May 20, 1996 report and work capacity evaluation, indicates that the position offered was consistent with appellant's physical limitations. Thus, there was insufficient support for appellant's stated reasons in declining the job offer. Accordingly, the refusal of the job offer, therefore, cannot be deemed reasonable or justified and the Office properly terminated appellant's compensation. Accordingly, the Board finds that the Office properly terminated appellant's compensation benefits on the basis that he refused.

Subsequent to the hearing representative's decision affirming the Office's termination decision, appellant requested reconsideration and submitted a November 18, 1999 report by Dr. Sinel to support that he was unable to work more than four hours per day. The Board finds Dr. Sinel's opinion insufficient to create a conflict with Dr. Fein's opinion. In his report, Dr. Sinel relied upon an inaccurate job description since appellant was not required to perform repetitive work and his lifting was limited to 15 pounds or less. Furthermore, provides no medical rational Dr. Fine's opinion therefor remains the weight of the medical evidence establishing that appellant was capable of working eight hours per day with restrictions.

[7] *James P. Robert*, 31 ECAB 1010 (1980).

[8] *Camillo R. DeArcangelis*, 42 ECAB 941 (1991).

The November 19, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.[9]

Dated, Washington, DC
October 10, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

[9] The Board notes that subsequent to the hearing representative's decision, appellant submitted new evidence. However, the Board may not consider new evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).